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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

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)

CS Docket No. 96-60

Leased Commercial Access

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COMMENTS OF U S WEST

Gregory L. Cannon
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2765

Attorney for

U S WEST, INC.

Of Counsel,
Dan L. Poole

May 15, 1996

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U S WEST, Inc. ("U S WEST") herein provides comments to the Federal Communications Commission's ("Commission") Further Notice of Proposed Rule-making ("FNPRM") in the above-captioned action.¹ In this docket, the Commission is proposing several modifications to its current commercial leased access rules. Most significantly, the Commission is proposing a wholesale change to the formula used to calculate commercial leased access rates. No wholesale change is necessary or appropriate. No factual basis has been established by the Commission or commenters which would support such a radical change in how leased access rates are calculated or the Commission's naked assertion that current rates are unreasonable. Also, the proposed changes are contrary to the mandate established by Con-

¹ In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation; Leased Commercial Access, MM Docket No. 92-266 and CS Docket No. 96-60, Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-122, rel. March 29, 1996.

gress for commercial leased access in its passage of the 1984 and 1992 Cable Acts.²

The Commission should not make these drastic changes until such time as it has more fully considered the need for such changes and their potential impact on the larger marketplace for video programming and distribution. At that time, the Commission should take a more focused approach to revising its commercial leased access rules, if and where necessary.

I. INTRODUCTION AND SUMMARY

As the Commission has noted in the FNPRM, the statutory framework for commercial leased access was established by the 1984 Cable Act and amended by the 1992 Cable Act. The primary intent of commercial leased access was to provide access to cable systems by programmers who were unaffiliated with cable operators. Such programmers would be allowed to provide programming on the system free from any editorial control which might be otherwise imposed. Commercial leased access, however, was not intended to be “common carrier” access to cable systems. In fact, such treatment is specifically prohibited by the statutory provisions of Title VI.³ Nor was commercial leased access intended to subsidize programmers who would not otherwise be able to produce economically viable commercial programming. Again, the Cable Act is clear that cable operators must be compensated such

² Cable Communications Policy Act of 1984, 47 USC § 521 (“1984 Cable Act”); as amended, Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (“1992 Cable Act”) (collectively “Cable Act”).

³ 47 USC § 541(c).

that they suffer no economic harm from leased access. Instead, commercial leased access was established to increase program diversity.

The current commercial leased access rules adequately balance the needs of both programmers and cable operators. The rule changes proposed in the FNPRM are likely to inflict significant economic harm on cable operators and substantially increase subscriber dissatisfaction with cable service offerings. These impacts will create a serious disadvantage for cable operators at a crucial time when competition in the video marketplace is exploding and subscribers are provided with multiple choices of video entertainment providers.

II. THE COMMERCIAL LEASED ACCESS RATE FORMULA CHANGES PROPOSED BY THE COMMISSION ARE NOT SUPPORTED BY THE RECORD OR CONGRESSIONAL INTENT

The Commission asserts in the FNPRM that the current commercial leased access rates are unreasonable and overcompensate cable operators. Additionally, the Commission claims that cable operators are being allowed to double recover channel charges, once from the subscriber in the tier charge and another time from the leased access programmer in access rates. If these statements of excessive profits from commercial leased access were accurate, one would assume that cable operators all over the country would be promoting leased access in an attempt to take advantage of this existing pricing anomaly. The fact is, however, that even current rates do not fully compensate cable operators for the actual “costs” associated with making channel space available to unaffiliated programmers. Such costs

are not purely related to marginal revenues, but have more important long-term impacts related to initial subscriber value perception and on-going customer satisfaction.

The “costs” of commercial leased access can be grouped into two distinct categories. The first is the pure financial impact of renting space on a cable operator’s distribution facility. The cost here can be easily quantified through the calculation of capital and expenses necessary to provide such capacity. This first type of cost is undoubtedly the cost the Commission is referring to when it claims a double recovery in current leased access rates.

The second cost is much harder to measure and is the main reason why cable operators are not out actively soliciting leased access programmers. The second cost is the cost associated with increasing subscriber dissatisfaction with regards to the variety of programming offered on cable systems. While somewhat difficult to measure, if subscribers perceive that there are not enough channels that they value in an operator’s program offerings, they will either drop cable service altogether or sign up with an alternative video service provider.

U S WEST has commissioned significant market research with regards to the cable programming offered by its MediaOne, Inc. (“MediaOne”) systems in Atlanta. Attached to this filing as Exhibit 1 is a segment of that research in which subscribers were asked what categories of programs were influential in their decision to subscribe to cable or their reason for continuing their subscription to cable. This market research shows that while programming categories such as news, current

movies, and sports enhance the value perception/likely retention of cable service to subscribers, categories such as shopping, international, and government do not. This research demonstrates that having additional leased access channels filled with programming categories perceived as low value will likely result in lower overall subscriber subscription/retention. The costs associated with subscriber acquisition/retention are much more significant than the pure financial cost of providing leased access. The cost of losing (or not adding) subscribers, especially in a competitive market, is much higher than the incremental gain associated with the double recovery allegedly inherent in current leased access rates.⁴

When added together, these two categories of costs far exceed the value of current rates for commercial leased access. Under the Commission's proposed cost/market approach, new leased access rates would undoubtedly be lower than the current rates. The Commission noted in the FNPRM that Congress did not intend that cable operators subsidize programmers who seek access to their systems through the provision of commercial leased access. This position is fully supported by the legislative history of both the 1984 and 1992 Cable Acts. Section 612(c)(1) of the Communications Act provides that the cable operator shall establish the price, terms, and conditions of commercial leased access "which are at least sufficient to

⁴ In fact, the cost relates both to a loss of marginal revenue received from additional subscribers and costs associated with attempts to win-back or win-over such customers at a later date. It is a generally accepted marketing principle that it is much cheaper to retain a current customer than to secure or "lure-away" a new customer. Some studies performed for telecommunications companies have calculated win-back costs as high as \$1,500 per subscriber.

assure that such use will not adversely affect the operation, financial condition, or market development of the cable system.”⁵ There is little doubt that the Commission’s proposed cost/market formula will adversely affect each of the three items listed. As such, its implementation by the Commission is likely to be unlawful.

III. CONSUMERS ARE LIKELY TO SUFFER A LOSS OF PROGRAM DIVERSITY AND BE LESS SATISFIED IF THE COMMISSION ADOPTS THE CURRENT LEASED ACCESS PROPOSALS

It is interesting to note that the Commission’s willingness to change its current rate formulas for leased access is not being driven by a large consumer outcry for additional programming diversity.⁶ In fact, the only outcry heard to date has come solely from potential leased access programmers -- some fairly large -- who have for the most part been unable to gain more traditional access to cable systems through inclusion in a cable operator’s channel lineup. This lack of traditional access is not due to any cognizant intent by cable operators, it only reflects the fact that the programming produced by these groups is duplicative of what is already on cable systems, e.g., home shopping and infomercials have little general interest to

⁵ 47 USC § 532(c)(1).

⁶ Additional program diversity is provided for in the channel occupancy limitations of the 1992 Cable Act. These provisions expressly prohibit a cable operator from having an ownership interest in more than 40% of the programming displayed on the cable system.

cable subscribers, i.e., very few subscribers would actually watch them on a regular basis.⁷

Although these commenters contend that anti-leased access programming practices are rampant across the country, U S WEST has not received such feedback in Atlanta. In fact, thus far U S WEST has only received positive feedback from programmers seeking leased access on its MediaOne systems. Leased access programmers who approach MediaOne are generally surprised that the commercial leased access rates are so low. MediaOne has never received a complaint from any leased access programmer, nor have any complaints been filed with regulatory authorities that it has denied a programmer leased access or charged rates which were unreasonable. To the contrary, MediaOne has regular leased access customers on its Atlanta systems who are very happy with the service MediaOne provides.

While a small group of vocal leased access programmers claim dissatisfaction with the current leased access rules and complain of a lack of access to cable systems, it is obvious that this discontentment is not universal. It is also fairly apparent that what this group of leased access programmers is actually seeking is cheap access to distribution channels to increase the viability of their offerings. Nowhere do they claim that cable operators have denied them access, only that access is cost prohibitive for their programming ventures. Increasing the viability of fringe programmers was not the original purpose of commercial leased access, nor is it the

⁷ Again, in U S WEST's market research performed in its MediaOne systems, some of the least watched channels in total were in the categories of government access, public access, and home shopping.

purpose today. As the Commission acknowledges in the FNPRM, Congress was concerned about cable operators exercising editorial control over all of the channels on a cable system and in promoting diverse sources of video programming; Congress was not concerned with providing affordable access to any and all programmers.⁸

Significant access for alternative programming is already available on cable systems through public, educational and government (“PEG”) access and Must Carry as provided in the 1992 Cable Act. Many programmers take full advantage of these access avenues and provide alternative programming accessible to all cable subscribers. Some of the Must Carry channels also lease “air time” to programmers providing additional outlets for alternative programming. Must Carry and PEG access are provided at little or no cost. It was in these specific areas that Congress intended cable operators to provide subsidized access to unaffiliated programmers, not in commercial leased access. As noted previously, subsidizing commercial leased access is specifically prohibited by the Cable Act.

Finally, cable subscribers are likely to end up with less program diversity if the current leased access rates are lowered. This result is, of course, contrary to the Congressional intent for commercial leased access to provide more program diversity. This diminishing of program diversity will result to the extent that the economics of certain types of programming categories, e.g., home shopping, are changed to encourage leased access program replacement of currently existing video programming. If leased access rates are lowered to the extremes proposed by the

⁸ FNPRM ¶¶ 25, 27.

Commission in the FNPRM, it is inevitable that some programming desirable to certain groups of subscribers will be bumped from cable systems and replaced by programming which has no interest to those groups, e.g., the History Channel being replaced by all day “infomercials.” It is hard to see how this result would correspond with the express wishes of Congress or appeal to the needs and wants of cable subscribers. Additional programs of the same type will not produce program diversity. On the contrary, it would represent a significant reduction in such diversity. It could also possibly cause a number of subscribers to abandon their cable service altogether, possibly choosing to subscribe to other competitive video offerings, e.g., Direct Broadcast Satellite (“DBS”) or Multi-Channel Multipoint Distribution Service (“MMDS”), which do not have similar leased access requirements.

IV. OTHER ISSUES RAISED BY THE COMMISSION

A. U S WEST Supports Part-Time Rate Options With Time-Of-Day Pricing

U S WEST supports the Commission’s continued use of the proration of the maximum rate with time-of-day pricing for calculating part-time leased access rates. It is important that part-time rates maintain the current option of charging different rates for different time periods. This option reflects the demand and value associated with specific programming times during the day. U S WEST has questions on the calculation of part-time rates, however, should the Commission move forward with its cost/market approach to leased access pricing.

In the Commission's proposed approach, opportunity costs are calculated for each channel utilized for leased access programming. Part-time programmers on fully-utilized leased access channels would presumably pay a proportionate share of the full opportunity costs associated with the channel. This method works fine until there is less than full utilization of a specified leased access channel. In the case of a leased access channel that is not completely utilized, i.e., less than the full 24-hour time available is leased, there is less programming to support the full opportunity costs associated with providing that channel. These opportunity costs are the same for the channel whether or not it is fully occupied by one or more leased access programmers. It would not be equitable for the cable operator to have to bear any portion of lost opportunity costs for a channel which was only partially occupied. Therefore, the Commission should ensure that cable operators are able to recover their full opportunity costs of providing a leased access channel whether or not the channel is fully occupied. In some cases, this could mean that a part-time leased access programmer, e.g., 8 hours a day, who was the only programmer currently occupying a channel, would be required to pay the full opportunity cost for providing that channel. Of course, as other programmers were added, the opportunity costs would be split-up proportionately. This is the only fair method which ensures that cable operators are able to fully recover lost opportunity costs and are not economically disadvantaged.

B. No Preferential Access Should Be Provided

U S WEST does not believe that preferential access is necessary or warranted for commercial leased access. By its name, commercial leased access would indicate that its use should be based on commercial or market rates. As many commenters have previously pointed out in other proceedings, there is certainly ample access available to non-profit and educational entities through Must Carry, PEG, and other outlets. No additional preferential treatment is warranted for leased access. Again, Congress intended leased access to promote programming diversity. It was not intended to subsidize underfunded programmers. If desirable for other reasons, a cable operator may choose to provide such discounted rates voluntarily. The Commission should not, however, mandate such preferences.

C. A Transition Period For Bumping Existing Channels Is Necessary And Appropriate

Should the Commission choose to modify its commercial leased access rate formula in the manner proposed, a transition period for bumping existing programming is necessary and appropriate. Cable operators have based their current channel lineups on the demand associated with leased access as it exists today. Should the Commission choose to radically change the leased access rate calculations, U S WEST is concerned that it will be unable to predict the demand for leased access under the new formula, and thus, the number of leased access channels potentially necessary. As any increased demand would necessarily result

in current programmers being “bumped” from the channel lineup, U S WEST requires a period of time so that it may orderly transition the existing programmers from the system. The Commission recognized such a need in its FNPRM.⁹

U S WEST proposes that the Commission allow a three-to-five year transition to the new rate formula similar to the one proposed in Appendix E of the FNPRM. In addition to the proposed rate formula transition, U S WEST proposes that the Commission also allow a separate three-to-five year transition period for bumping existing channels where an operator does not currently have excess channel capacity on its system. This transition period is necessary so that programmers who have existing contracts with cable operators are allowed to complete the terms of such agreements. This transition period will also lessen what could possibly be a fairly severe impact on subscribers. During the first year of the transition period, U S WEST proposes that operators not be required to bump any existing channels. This will give operators and programmers time to revise their program agreements and current channel lineups, where necessary. During the second and third years of the transition period, operators would be required to bump three existing channels (over the two year period) to make room for additional leased access demand (or up to the required leased access channel capacity for their systems specified under the Cable Act, whichever is less). During the fourth year, an additional three existing channels could be bumped, if necessary and required. And, an additional three channels in year five, again if necessary and required.

⁹ FNPRM ¶ 99.

After the transition period, operators would be required to have all leased access capacity available for use. This proposed transition is necessary for cable operators to effectively handle any increase in demand for leased access capacity. It is also beneficial to subscribers who might otherwise be required to suffer a wholesale change to their channel lineups as a result of the Commission-proposed changes to the leased access rate formulas.

D. Resale Of Leased Access Time Should Be Prohibited

Resale of commercial leased access programming should not be allowed. Such a use will only serve to encourage brokering of prime leased access space and result in less choice for smaller programmers. It would also make it difficult for cable operators to maintain some sort of minimal control over what programming is delivered over their cable systems. Even though the original leased access programmer agrees to certain conditions for carriage, a subsequent purchaser of that time may not agree to the same terms or even know that the previously agreed to terms exist. The Commission should prohibit the resale of leased access time without exception.

E. Selection Of Leased Access Programming

The Commission has tentatively concluded, and U S WEST agrees, that leased access programmers should be allowed to choose specific time periods on a first-come, first-served basis. This is the fairest allocation methodology and also the

simplest for cable operators to administer. To the extent that a cable operator has insufficient capacity to accommodate all leased access requests, the cable operator should be able to choose, based upon the current makeup of existing leased access programming types, programming which does not substantially duplicate a current leased access offering. This promotes both program diversity and allows previously existing leased access programmers more opportunity for viewership.

V. CONCLUSION

No wholesale changes to the existing leased access rules or rate formulas are necessary or appropriate. The Commission should more fully consider the impacts of such proposals to cable operators and cable subscribers prior to implementing such drastic changes. Commercial leased access was not created by Congress to provide subsidized access opportunities for fringe programmers. The Commission must not circumvent the intent of Congress by providing below-cost leased access rates. All costs, including the impact of lost subscribers, must be factored into the rate calculation. And, although a few vocal leased access programmers have complained that they are being excluded from cable systems, the record and U S WEST's experience in Atlanta does not support their claims or the massive changes proposed by the Commission. The Commission should avoid taking a

shotgun approach to the current leased access issues when a more targeted approach would be more effective and less disruptive to cable subscribers.

Respectfully submitted,

U S WEST, INC.

By:



Gregory L. Cannon

Suite 700

1020 19th Street, N.W.

Washington, DC 20036

(303) 672-2765

Its Attorney

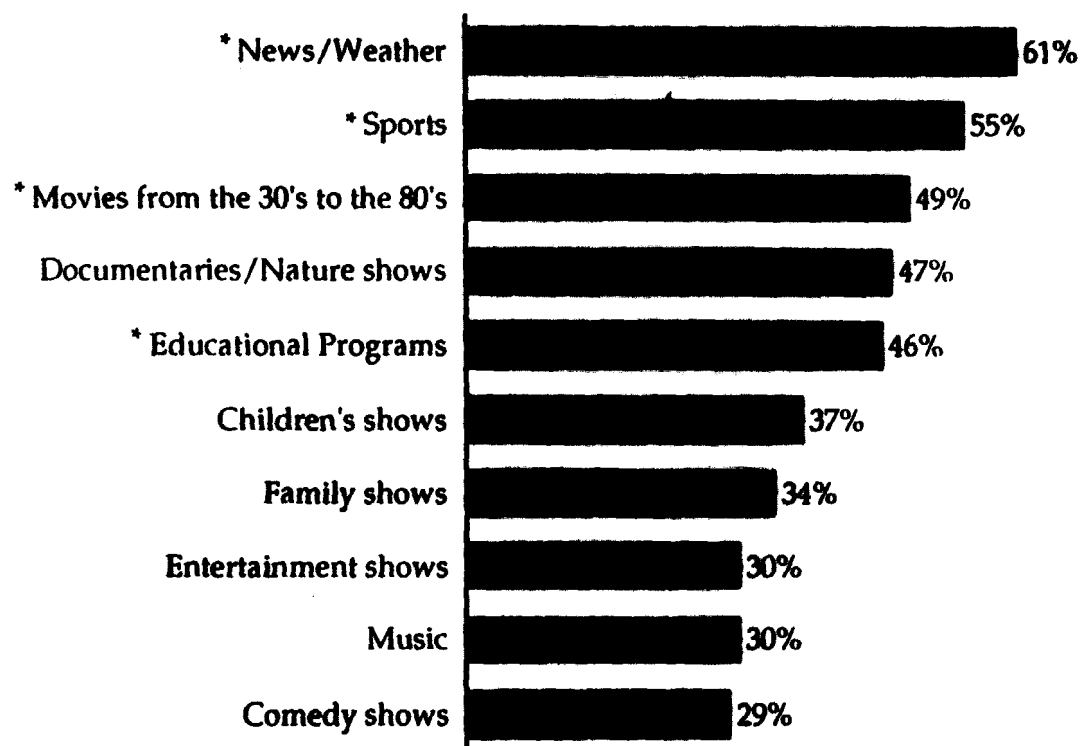
Of Counsel,
Dan L. Poole

May 15, 1996

EXHIBIT 1

Venues Driving Cable Subscriptions/Retention Unaided and Aided Responses

(n=257)

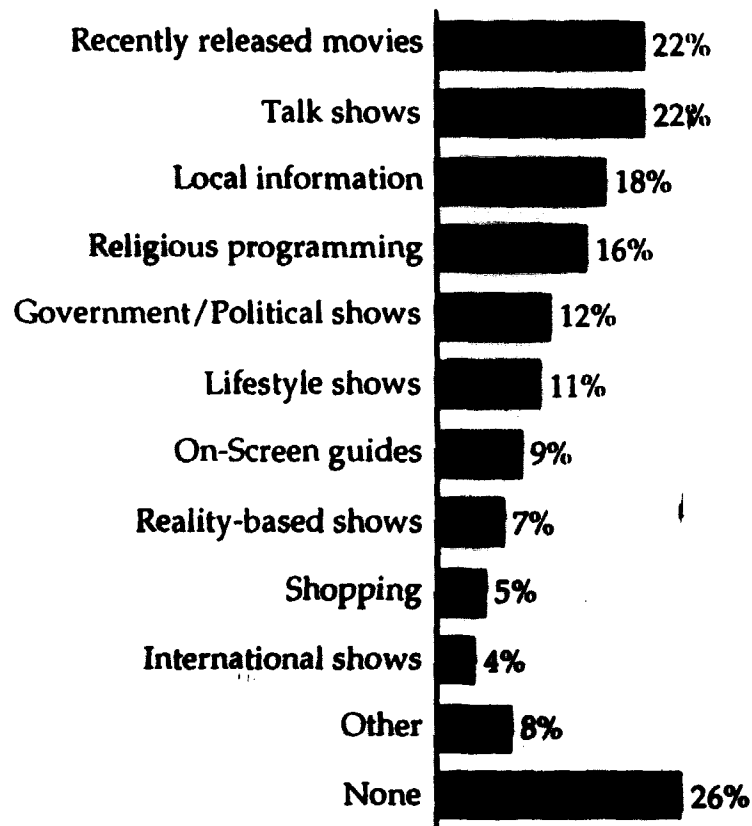


When asked what types of programs were influential in their decision to subscribe to cable or their reason for continuing their subscription (among those whose reasons have changed), the most frequently mentioned responses are news/weather, sports, movies from the 30's to the 80's, documentaries/nature, and educational shows.

* Top four mentions to the unaided question.

Venues Driving Cable Subscriptions Unaided and Aided Responses (continued)

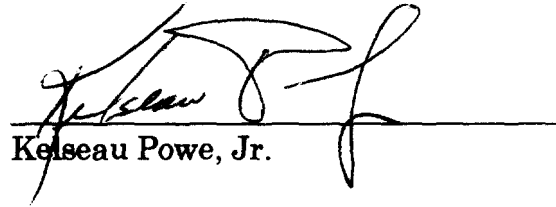
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The ability to watch international, shopping, and reality-based shows is rarely mentioned as a reason for subscribing to or keeping cable television service.

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 15th day of May, 1996, I have caused a copy of the foregoing **COMMENTS OF U S WEST** to be served via hand-delivery upon the persons listed on the attached service list.



Kelseau Powe, Jr.

James H. Quello
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, DC 20554

Reed E. Hundt
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, DC 20554

Susan P. Ness
Federal Communications Commission
Room 832
1919 M Street, N.W.
Washington, DC 20554

Rachelle B. Chong
Federal Communications Commission
Room 844
1919 M Street, N.W.
Washington, DC 20554

Meredith Jones
Federal Communications Commission
9th Floor
2033 M Street, N.W.
Washington, DC 20554

Lynn Crakes
Federal Communications Commission
Room 918
2033 M Street, N.W.
Washington, DC 20554

(CS9660.GC/lh)
Last Update: 5/14/96

International Transcription
Services, Inc.
Suite 140
2100 M Street, N.W.
Washington, DC 20037